

2014 WL 9911017 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Byron Van TASSELL and Reyna Van Tassell, husband and wife, Plaintiffs,
v.

UNIVERSITY MEDICAL CENTER CORPORATION, an Arizona corporation, Healthsouth
Corporation, an Arizona corporation doing business as Healthsouth Southern
Arizona Rehabilitation Hospital, John Does I-V, abc Corporations I-V, Defendants.

No. C20099898.
January 28, 2014.

Oral Argument Requested

**Defendant Southern Arizona Rehabilitation Hospital's Motion for partial
Summary Judgment on Plaintiff's Apsa and Attorney's Fees Claims**

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Suite 1900, Tucson, Arizona 85701, Tel: 520-628-7070, Fax: 520-624-3849, for defendant So. Ariz. Rehab. Hospital.

Hon. [Charles Harrington](#).

Pursuant to *Ariz. R. Civ. P. 56*, defendant Southern Arizona Rehabilitation Hospital, dba Southern Arizona Regional
Rehabilitation Hospital (hereinafter "SARRH"), moves for summary judgment in its favor on plaintiff's claim under the Adult
Protective Services Act, [A.R.S. §46-455](#). There is no material issue of fact and SARRH is entitled to judgment as a matter of law.

This motion is supported by the attached memorandum and the accompanying Joint Statement of Facts in Support of SARRH's
Motions for Summary judgment.

DATED: January 28, 2014.

GUST ROSENFELD P.L.C.

By: <<signature>>

James W. Kaucher

Attorneys for Defendant SARRH

MEMORANDUM

This is a medical malpractice, wrongful death, and vulnerable adult **abuse** case. The plaintiff, Reyna Van Tassell, claims that her
deceased husband was injured, and ultimately died, as a result of the negligence of defendants University Medical Center and
SARRH. At the same time SARRH filed this motion, it also filed a motion for summary judgment, seeking complete dismissal
of plaintiff's claims against SARRH because the plaintiff cannot prove that SARRH's alleged misconduct proximately caused
Byron Van Tassell's injuries and his death. If that motion is granted, this motion is moot. If, however, that motion is not granted,

this motion seeks dismissal of the plaintiffs claims under the Adult Protective Services Act, [A.R.S. §46-455](#) (“APSA”). As this memorandum will show, the plaintiffs Third Amended Complaint, which contains her APSA claim, was filed long after the statute of limitations expired. Because the plaintiff unreasonably delayed filing her APSA claim and because her delay unfairly prejudiced SARRH, the Third Amended Complaint does not related back to the date on which the Complaint was originally filed. Summary judgment in favor of SARRH on the APSA claim is therefore appropriate.

BACKGROUND

A. Factual Background.

On November 9, 2007, Byron Van Tassell (“Van Tassell”) fell from a ladder, hit a fence, and suffered severe injury to his thoracic spine. *Joint Statement of Facts in Support of SARHH’s Motions for Summary Judgment* ¶1 (hereinafter “JSOF”). He was taken to University Medical Center in Tucson (“UMC”) where he underwent surgery. *Id.* He was transferred to Southern Arizona Regional Rehabilitation Hospital (“SARRH”) on November 20, 2007 for post-operative care and for intensive inpatient rehabilitation. JSOF ¶3.

Van Tassell returned to UMC on December 4, 2007 for treatment of a pulmonary embolus and bilateral [deep vein thrombosis](#). JSOF ¶4. During his UMC stay, Van Tassell developed [pleural effusion](#), endured multiple code arrests, had chest tubes placed, and was transferred to ICU. He slowly recovered from these life-threatening crises and eventually returned to SARRH on December 26, 2007. JSOF ¶5.

When Van Tassell returned to SARRH, he had skin breakdown over his sacrum. He also had a pre-existing [pressure ulcer](#) on his left heel.¹ JSOF ¶6. During this SARRH hospitalization, Van Tassell was attended by Mark Feldman, M.D. (internist), Jeffrey Wick, M.D. (physiatrist and certified wound care specialist), and Phyllis Click, F.N.P. (nurse practitioner employed by Dr. Wick). Van Tassell was seen and followed by SARRH’s wound care nurse, Michael Allen, L.P.N. and by SARRH’s team of nurses, therapists, and nutritionists. JSOF ¶7.

In the early morning hours of January 6, 2008, Van Tassell was transported to Northwest Hospital emergency department, where he was diagnosed with [pneumonia](#). He was started on IV antibiotics and sent back to SARRH. JSOF ¶8.

After Van Tassell’s return to SARRH, he continued to be monitored by his health care providers. Dr. Feldman, Dr. Wick, and Ms. Click saw Van Tassell frequently, were aware of his condition, and issued orders as they thought appropriate. Ms. Allen monitored Van Tassell’s sacral wounds and worked with Dr. Wick to implement and to carry out a treatment plan. JSOF ¶9. Van Tassel was also seen by James Fiastro, M.D. for a pulmonary consultation. JSOF ¶10. Ms. Allen’s documentation included photos of the wounds. JSOF ¶11.

After Van Tassell had been suffering recurrent fevers, Dr. Feldman ordered Van Tassell to be transferred to Northwest Hospital. JSOF ¶12. While at Northwest Hospital, Van Tassell was diagnosed with an infected sacral wound. Among other things, he was treated with antibiotics and he underwent [surgical debridement of his wound](#). JSOF ¶13.

Van Tassel returned to SARRH on January 27, 2008. JSOF ¶14. He remained there until February 2, 2008. When he was discharged, his attending physician was pleased with Van Tassell’s progress and deemed him stable enough to return home. JSOF ¶15.

For the next four years, Van Tassell suffered a variety of maladies, underwent multiple surgeries, and was admitted to hospitals and nursing home more than 20 times. Among his maladies were [recurrent urinary tract infections](#), recurrent skin breakdown, [gangrene](#), [depression](#), pulmonary embolus, [small bowel obstruction](#), and [diabetes](#). JSOF ¶16.

Van Tassell died on January 28, 2012. The Pima County Medical Examiner conducted a “record” autopsy and concluded that Van Tassell died of “complications of [paraplegia](#).” JSOF ¶17. According to Van Tassell's attending physician, Van Tassell suffered from acute respiratory failure, secondary to his [paraplegia](#). He also had [pneumonia](#), [pulmonary hypertension](#), and other ailments. JSOF ¶18.

B. Procedural Background.

On December 23, 2009, Van Tassell tiled his complaint against HealthSouth Corporation, UMC, and fictitious defendants, for medical negligence. His wife Reyna Van Tassell was a plaintiff seeking damages for loss of consortium. JSOF ¶19. The plaintiffs did not allege liability under APSA. *Id.*

On January 4, 2011, the plaintiffs filed an Amended Complaint. The purpose of this amendment was to dismiss HealthSouth Corporation and to add Southern Arizona Regional Rehabilitation Hospital, LP (SARRH). and by stipulation, this amended complaint related back to the date on which the original complaint was filed. JSOF ¶22.

Shortly after the plaintiffs filed their First Amended Complaint, their action was nearly dismissed. On January 19, 2011, the date originally set for expert disclosure, the plaintiffs were unable to disclose opinions adverse to SARRH. JSOF ¶¶20-21, 23. In response to SARRH's resulting motion for summary judgment, the plaintiffs disclosed a preliminary affidavit from Wanda Pene, R.N., but her affidavit was still inadequate. JSOF ¶25. Although the Court denied SARRH's motion, it ordered plaintiffs to provide better disclosure regarding the claim against SARRH. JSOF ¶26. This resulted in the disclosure of three new experts and a more detailed discussion of SARH's alleged negligence. JSOF ¶¶28, 29

Van Tassell's wife Reyna eventually was appointed the personal representative of his estate. After the Court ruled that the action would be dismissed unless Mrs. Van Tassell was substituted as the plaintiff the plaintiff eventually filed her Second Amended Complaint.² JSOF ¶¶30-31. The Second Amended Complaint did not add any substantive claims; it merely substituted Mrs. Van Tassell as the plaintiff and made other changes appropriate to the Estate being a party. JSOF ¶32.

On November 2, 2012, plaintiff moved to file her Third Amended Complaint. For the First time, the plaintiff sought to add APSA and wrongful death claims. JSOF ¶33. Although the Court never ruled on this motion, the plaintiff filed her Third Amended Complaint on December 19, 2012. JSOF ¶42. UMC and SARRH filed their Answers. *Id.* In its Answer to the Third Amended Complaint. SARRH asserted, among other things, the affirmative defenses of statute of limitations, laches, and failure to state a claim upon which relief may be granted. JSOF ¶43.

ARGUMENT

I. SUMMARY JUDGMENT GENERALLY.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. [Ariz. R. Civ. P. 56\(a\)](#). In deciding whether to grant a summary judgment motion based on the statute of limitations, our Court of Appeals said:

“The purpose of the statute of limitations is to ‘protect defendants and courts from stale claims where plaintiffs have slept on their rights.’” [Doe v. Roe](#), 191 Ariz. 313, ¶29, 955 P.2d 951, 960 (1998), quoting [Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.](#), 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995), *Statutes of limitations are premised on two foundations: First, that a person who has a valid claim will promptly “ ‘attempt to enforce a demand,’” and second, that after too much time has passed. “ ‘by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.’ ”* [Mayer v. Good Samaritan Hosp.](#), 14 Ariz.App. 248, 251, 482 P.2d 497, 500 (1971). quoting [Riddlesbarger v. Hartford Ins. Co.](#), 74 U.S. 386, 390, 7 Wall. 386, 19 L.Ed. 257(1868). [Wycoff v. Mogollon Health Alliance](#), 232 Ariz. 538, 540-41, 307 P.3d 1015, 1017-18 (Ct. App. 2013) (emphasis added).

II. THE APSA CLAIM IN THE THIRD AMENDED COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS.

The statute of limitations on the APSA claim is two years. [A.R.S. 46-455\(K\)](#). The original complaint was filed December 23, 2009. Even if the APSA claim in the Third Amended Complaint related back, it would cover only events occurring on or after December 23, 2007. It would not cover anything occurring during Van Tassell's first stay at SARRH.³ For the reasons that follow, however, the APSA claim does not relate back to the original complaint.

Although the Rules of Civil Procedure are permissive regarding amendments and relation back of those amendments to the original Complaint, there are limits. For a newly-added claim to relate back under Ariz. R. Civ. P. 15(e), it must have arisen “out of the conduct, transaction, or occurrence set forth or attempt to be set forth in the original pleading.” [Ariz. R. Civ. P. 15\(c\)](#). See generally [Watts v. State](#), 115 Ariz. 545, 566 P.2d 693 (Ct. App. 1977). However, when an amendment substantively and substantially changes the claim, when it comes late in the case, when it causes undue delays, and when it causes unfair prejudice to the opposing party, the amendment is improper. See [Owen v. Superior Court](#), 133 Ariz. 75, 80-81, 649 P.2d 278, 283-84 (1982) (affirming denial of motion to amend which sought to add claims of independent negligence where the previous claim was only for vicarious liability). See also [League of Arizona Cities and Towns v. Martin](#), 219 Ariz. 556, 558, 201 P.3d 517, 519 (2009) (a claim may be barred by laches when the plaintiff unreasonably delays in bringing the claim and the delay results in prejudice to the opposing party).

A. The Third Amended Complaint Is Substantively Different from the Original Complaint.

Mere medical malpractice is not an APSA violation. First, the negligence must have been committed upon a vulnerable adult and it must be related to the plaintiff's vulnerability. [McGill v. Albrecht](#), 203 Ariz. 525, 530, 57 P.3d 384, 389 (2002). Second, something more than mere negligence is necessary to sustain an APSA claim.

Negligence is not actionable under APSA unless the plaintiff is able to show “a pattern of conduct ... resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health.” This application of negligence under APSA is very different from the usual definition of negligence in a medical malpractice case, in which a plaintiff need only “prove the causal connection between an act or omission and the ultimate injury.”

[In re Estate of Wyatt](#), 232 Ariz. 506, 510, 307 P.3d 73, 77 (Ct. App. 2013) (citation omitted) (quoting [Barrett v. Harris](#), 207 Ariz. 374, 378, 86 P.3d 954, 958 (Ct. App. 2004).

None of this is in the original Complaint. Instead, it merely alleges that Van Tassell sought medical services from defendants and that the defendants failed “to exercise that degree of care, skill, and learning expected of reasonable, prudent healthcare providers in the profession or class within the state acting in the same or similar circumstances,” “breached their duty,” and that as a result of their “negligent conduct,” Van Tassell “suffered pain, grief, permanent injury, and disfigurement.” JSOF ¶19. In short, the Complaint (and the first two Amended Complaints) were mere medical malpractice cases - precisely what the *Wyatt* court was something “very different” from an APSA claim. There was nothing in the original Complaint that put SARRH fairly on notice that it needed to defend an APSA claim.

B. The Plaintiff Unreasonably Delayed Asserting An APSA Claim.

There is no apparent reason why the plaintiff waited to add an APSA claim so late in the case. Three years after the underlying events and more than a year after plaintiffs filed the original Complaint, the plaintiffs original expert disclosure showed that the claim against SARRH was little more than an afterthought.

Ms. Pene reviewed the Healthsouth records as well. However, it was only recently that plaintiff was provided with confirmation that plaintiff was provided with a complete copy of the UMC chart. Ms. Pene is now in the process of reviewing the records of the December 26, 2007 Healthsouth admission in order to give opinions about the reasonableness of care there.

Plaintiff's Expert Disclosure Statement, January 14, 2011 at 3 (exhibit 44 to JSOF). Nine months later, and after a reprieve from summary judgment, the plaintiffs added three more experts: a physician causation expert, a nutritionist, and a wound care nurse. JSOF ¶28. They also added considerable more detail to their criticism of the defendants. JSOF ¶29. Nonetheless, the plaintiffs did not seek to add an APSA claim to the case. This remained true a year later, when the plaintiff filed her Second Amended Complaint on September 25, 2012. JSOF ¶¶30-32.

There was no relevant change in the case before the plaintiff proffered the Third Amended Complaint on November 2, 2012. According to plaintiffs motion to amend, the only apparent difference is the addition of Jennifer James, M.D. to the plaintiffs stable of experts. JSOF ¶¶33, 40. However, Dr. James is a *causation* expert witness. *Deposition of Jennifer James, M.D.* at 38-39 (exhibit 50 to JSOF). Moreover, as a physician, she cannot testify to the standards of care for nurses and other non-physician providers involved in Van Tassell's care at UMC and SARRH. [A.R.S. §12-2604\(A\)](#). See [Baker v. University Physicians Healthcare](#), 231 Ariz. 379, 296 P.3d 42 (2013). Although Dr. James' causation opinion might have (arguably) provided a basis for the wrongful death claim, it offered nothing new to support the APSA claim.⁴

C. The Plaintiff's Unreasonable Delay Caused Substantial Prejudice to SARRH.

By the time the plaintiff got around to filing the Third Amended Complaint, nearly six years had passed since the underlying conduct. Not only has evidence gone stale, allowing the amendment to relate back unfairly deprives SARRH of critical defenses.

[A.R.S. §46-454\(A\)](#) required that Van Tassell's physician(s) and perhaps others to report to the appropriate authorities if they had “a reasonable basis to believe that **abuse** or neglect of the adult has occurred.” Such a report should have been “made immediately in person or by telephone and [should have been] followed by a written report mailed or delivered within forty-eight hours or on the next working day if the forty-eight hours expire on a weekend or holiday.” [A.R.S. §46-454\(A\)](#). So far, there is no indication that Van Tassell's physicians or anyone else (including Reyna Van Tassell) made any report to a peace officer or to Adult Protective Services, as was required by [A.R.S. §46-454\(B\)](#). If plaintiffs Third Amended Complaint is true, and Van Tassell was the victim of **abuse**, virtually all of the physicians who attended Van Tassell from the middle of December 2007 until his death failed in their duty to report Van Tassell's alleged **abuse** and should be nonparties-at-fault.

Plaintiff's newly-disclosed causation theory makes this problem even worse. As explained in SARRH's main Motion for Summary Judgment, plaintiff's medical causation expert witness thinks that Van Tassell developed a profound metabolic derangement during his December 2007 UMC hospitalization. JSOF ¶¶46-48. This is a condition that should have been diagnosed and treated by Van Tassell's attending physicians after he left UMC. *Deposition of Jennifer James, M.D.* at 72-75, 78-80 (exhibit 50 to JSOF). However none did so. *Id.* at 82-84, 114-15. If the plaintiff claims that Van Tassell was still salvageable during his December 2007 to January 2008 SARRH hospitalization, Dr. James' theory requires all of Van Tassell's attending physicians between December 26, 2007 and Van Tassell's death to be nonparties-at-fault.⁵

Unfortunately, the non-party at fault deadline expired March 14, 2011. JSOF ¶27.

CONCLUSION

Five years after the underlying events and three years after the original suit was filed, the plaintiff added a claim that is substantially different from her original claim. There is no coherent reason for this delay. Moreover, this delay has profoundly prejudiced SARRH by, among other things, depriving it of critical nonparty-at-fault defenses. For these reasons, SARRH asks that this Court rule that the APSA amendments to the Third Amended Complaint do not relate back to December 27, 2009, that the APSA claim is barred by the statute of limitations, and that summary judgment should be entered in favor of SARRH on this claim.

DATED: January 28, 2014.

GUST ROSENFELD P.L.C.

By: <<signature>>

James W. Kaucher

Attorneys for Defendant SARRH

The original was filed and a copy was delivered on January 28, 2014 to:

Hon. Charles V. Harrington

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Footnotes

- 1 This lesion developed in the latter stages of the November 20-December 4, 2007 SARRH stay.
- 2 The Second Amended Complaint was filed on the last day before dismissal was set to occur. JSOF ¶31.
- 3 Plaintiff has admitted that the only SARRH admission at issue is the December 26, 2007 to January 12, 2008 hospitalization. JSOF ¶44.
- 4 SARRH's motion for summary judgment discusses the significant problems with the disclosure of Dr. James' opinions. *SARRH's Motion for Summary Judgment* at 11-13.
- 5 Such a claim would be contrary to Dr. James' deposition testimony, in which she was clear that Van Tassell's metabolic derangement was already terminal and irreversible when Van Tassell was transferred from UMC to SARRH on December 26, 2007. *SARRH's Motion for Summary Judgment* at 6-8.

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